

# Case Comment

## ***Jacksonville Bulk Terminals: The Norris-LaGuardia Act and Politically Motivated Strikes***

### I. INTRODUCTION

Following the Soviet Union's intervention in Afghanistan in December 1979, President Carter placed an embargo on shipments of grain to the Soviet Union on January 4, 1980.<sup>1</sup> Apparently dissatisfied with the scope of the embargo, the International Longshoremen's Association (ILA) announced on January 9, 1980, that its members would refuse to handle any cargo destined for or arriving from the Soviet Union, or carried on Soviet ships.<sup>2</sup> Employers, carriers, and businesses affected by the work stoppage filed a number of suits against the ILA seeking damages and injunctive relief, relying on two basic theories: 1) The work stoppage violated clauses in the collective bargaining agreement that prohibited strikes during the agreement and required the submission of disputes to arbitration;<sup>3</sup> and 2) The work stoppage violated the secondary boycott provisions of section 8(b)(4) of the National Labor Relations Act,<sup>4</sup> entitling the injured parties to damages under section 303 of the Labor Management Relations Act<sup>5</sup> and permitting the National Labor Relations Board to seek injunctive relief in federal district court under section 10(I) of the National Labor Relations Act.<sup>6</sup>

In *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*<sup>7</sup> the employer chose the first theory, seeking to enjoin the work stoppage pending arbitration. The United States Court for the Southern District of Florida granted the injunction, but was reversed by the United States Court of Appeals for the Fifth Circuit in a decision on a consolidated appeal.<sup>8</sup> The Court of Appeals found that the work stoppage was a labor dispute within the meaning of the Norris-LaGuardia Act,<sup>9</sup> thereby invoking the Act's removal of federal court jurisdiction to issue injunctions in cases "involving or growing out of any labor dispute."<sup>10</sup> The court also

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1. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 102 S. Ct. 2673, 2677 (1982).

2. *Id.* at 2677 n.2.

3. *Id.*; see *Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n*, 631 F.2d 282 (4th Cir. 1980), *cert. denied*, 102 S. Ct. 3482 (1982).

4. 29 U.S.C. § 158(b)(4) (1976).

5. *Id.* § 187.

6. *Id.* § 160(I). The following are some of the cases that have been brought under this theory: *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982); *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445 (5th Cir. 1980); *Walsh v. International Longshoremen's Ass'n*, 488 F. Supp. 524 (D. Mass. 1980), *aff'd*, 630 F.2d 864 (1st Cir. 1980). See Note, *Enjoining Political Protest Strikes*, 38 WASH. & LEE L. REV. 1285 (1981); Comment, *Longshoremen's Embargo of Soviet Goods: A Secondary Boycott or a Political Protest?*, 32 MERCER L. REV. 857 (1981).

7. 102 S. Ct. 2673 (1982).

8. *New Orleans S.S. Ass'n v. General Longshore Workers*, 626 F.2d 455 (5th Cir. 1980).

9. *Id.* at 465 (construing 29 U.S.C. §§ 101-15 (1976)).

10. 29 U.S.C. § 104 (1976).

found that the strike was not over an issue that was subject to arbitration.<sup>11</sup> Therefore, following *Boys Markets, Inc. v. Retail Clerks Union, Local 770*<sup>12</sup> and *Buffalo Forge Co. v. United Steelworkers*,<sup>13</sup> the court held that the strike could not be enjoined pending arbitration, although arbitration of the issue of whether the no-strike clause in the contract had been violated could be compelled.<sup>14</sup>

The issues on appeal to the Supreme Court remained the same,<sup>15</sup> but the employer also urged the Court to reconsider *Buffalo Forge* if it found that *Buffalo Forge* applied.<sup>16</sup> The Supreme Court affirmed the decision, finding that the Act applies to politically motivated disputes,<sup>17</sup> and refusing to reconsider *Buffalo Forge*.<sup>18</sup> Three Justices vigorously dissented, arguing both that the Norris-LaGuardia Act should apply only when unions strike to "advance the economic interests of their members"<sup>19</sup> and that, even if the Act did apply, *Buffalo Forge* should be overruled to permit injunctions pending arbitration of strikes in violation of no-strike clauses and agreements to arbitrate disputes.<sup>20</sup>

*Jacksonville* thus raises two major questions concerning federal labor law. First, do the anti-injunction provisions of the Norris-LaGuardia Act apply to politically motivated work stoppages? Second, if they do, should the arbitration and no-strike clauses in the collective-bargaining agreement bring the strike within the *Boys Markets* exception to the Act<sup>21</sup> when the strike is not over an arbitrable grievance? This Case Comment will focus primarily on the first question, which received surprisingly little attention prior to *Jacksonville*.<sup>22</sup> It will proceed from an analysis of the background and purposes of the Norris-LaGuardia Act to a discussion of possible approaches to the problem of applying the Act to politically motivated work stoppages, and will suggest an alternative rationale to support the court's holding in *Jacksonville*. Primary emphasis will be on the competing policy interests: on one hand, the Act's policy of preventing federal courts from issuing labor injunctions and the union's interest in asserting political beliefs through work stoppages; and, on the other hand, the employer's need for speedy relief and the general federal labor policy

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11. 626 F.2d 455, 467 (5th Cir. 1980).

12. 398 U.S. 235 (1970).

13. 428 U.S. 397 (1976).

14. 626 F.2d 455, 465-67 (5th Cir. 1980).

15. 102 S. Ct. 2673, 2679 (1982).

16. *Id.* at 2686 n.23.

17. *Id.* at 2687.

18. *Id.* at 2686 n.23.

19. *Id.* at 2688 (Burger, C.J., dissenting).

20. *Id.* at 2690 (Powell, J., dissenting).

21. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) (holding that the Act does not apply to a strike over an arbitrable grievance).

22. Prior reported cases dealing with politically motivated strikes include the following: *United States Steel Corp. v. United Mine Workers*, 519 F.2d 1236 (5th Cir. 1975) (assumes politically motivated strike is within the Act); *Khedivial Lines, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49 (2d Cir. 1960) (Act does not apply to politically motivated strikes; case decided on other grounds); *West Gulf Maritime Ass'n v. International Longshoremen's Ass'n*, 413 F. Supp. 372 (S.D. Tex. 1975) (Act does not apply to political disputes), *aff'd mem.*, 531 F.2d 574 (5th Cir. 1976); *Harrington & Co. v. International Longshoremen's Ass'n, Local No. 1416*, 356 F. Supp. 1079 (S.D. Fla. 1973) (Act does not apply to politically motivated strikes). None of these cases contains an extensive analysis of the issue.

of promoting industrial peace, specifically through arbitration of disputes. Finally, the author will give some attention to the continuing validity of *Buffalo Forge* and the existence and usefulness of employer remedies other than the labor injunction.

## II. "LABOR DISPUTE" WITHIN THE MEANING OF THE NORRIS-LA GUARDIA ACT

An analysis of the application of the Norris-LaGuardia Act to politically motivated work stoppages obviously must start with an analysis of the Act itself. The Act, passed in 1932, was a response to a series of Supreme Court decisions interpreting the earlier Clayton Act.<sup>23</sup> In passing the Clayton Act, Congress intended to prevent the federal courts from enjoining strikes as violations of the antitrust provisions of the Sherman Act.<sup>24</sup> The Court, however, severely limited the application of the Clayton Act in *Duplex Printing Press Co. v. Deering*<sup>25</sup> and *Bedford Cut Stone Co. v. Stone Cutters Association*.<sup>26</sup> The holdings in the *Duplex Printing Press* and *Bedford Cut Stone* line of cases resulted in strikes being routinely enjoined in their early stages, thus effectively breaking the strikes and defeating the union's efforts to organize.<sup>27</sup> The purpose of the Norris-LaGuardia Act was to remove this obstacle to union organization by "taking the federal courts out of the labor injunction business,"<sup>28</sup> thus leaving labor disputes to be resolved by the economic power of the contesting parties rather than by the intervention of the federal judiciary.

Accordingly, Congress provided a very broad scope for the anti-injunction protections of the Norris-LaGuardia Act. The Act removes federal court jurisdiction "to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute"<sup>29</sup> with certain narrow exceptions for cases of fraud or violence against person or property.<sup>30</sup> The Act defines labor disputes and cases "involving or growing out of" labor disputes very broadly. Section 13(a) provides,

A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, . . . or have direct or indirect interests therein; or who are employees of the same employer; . . . whether such dispute is . . . between one or more employers or associations of employers and one or more employees or associations of employees; . . . or when the case involves any conflicting or competing interest in a "labor dispute" . . .<sup>31</sup>

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23. Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1976); 29 U.S.C. §§ 52-53 (1976)).

24. See F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 142-44 (1963); C. GREGORY, *LABOR AND THE LAW* 158-99 (2nd rev. ed. 1961).

25. 254 U.S. 443 (1921) (holding that a secondary boycott and a sympathy strike called to promote unionization at another plant were not labor disputes under the Clayton Act because the object was not legitimate and no proximate employer-employee relationship existed).

26. 274 U.S. 37 (1927) (refusal to work on nonunion goods not a labor dispute).

27. See F. FRANKFURTER & N. GREENE, *supra* note 24, at 173-76, 200-01.

28. *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960).

29. 29 U.S.C. § 104 (1976).

30. *Id.* § 104(e).

31. *Id.* § 113(a).

The Act then defines "labor dispute" in section 13(c) as "any controversy concerning terms or conditions of employment, . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."<sup>32</sup>

A literal reading of section 13(a) would not require the existence of a "labor dispute" as defined in section 13(c) for the protections of the Act to apply. Section 4 prohibits the issuance of injunctions in cases "involving or growing out of any labor dispute,"<sup>33</sup> and section 13(a) may be read literally as defining these cases to include any case in which there is a dispute between an employer and employees. After listing disputes between employer and employees as one of three types of cases that "shall be held to involve or grow out of a labor dispute," section 13(a) refers to the section 13(c) definition of a "labor dispute" as a separate category of cases growing out of labor disputes.<sup>34</sup> Despite some support for this interpretation,<sup>35</sup> the courts have generally assumed that the existence of a section 13(c) labor dispute is required, without necessarily deciding the issue.<sup>36</sup> This view may be supported by reading section 13(a) as merely defining the parties between whom a labor dispute may arise, with the additional requirement of a section 13(c) labor dispute.

Although the courts have read section 13(a) narrowly, they have interpreted section 13(c) very broadly. In an early leading case the Supreme Court held picketing by members of a community organization demanding that a store hire black employees to be protected by the Act.<sup>37</sup> Despite the picketers' lack of more than a tenuous interest in potential employment at the store and the lack of a dispute over such traditional terms and conditions of employment as wages, hours, and working conditions, the Court found that the picketers had a legitimate interest in removing employment discrimination and noted that "[t]he Act does not concern itself with the background or the motives of the dispute."<sup>38</sup> This broad interpretation of the Act supports the conclusions reached by one commentator that any distinction between section 13(c) and section 13(a) is generally of little importance and that "[s]o long, at least, as some reasonable relation to labor problems is apparent, it would seem . . . that the existence of a labor dispute may properly be determined under [section 13(a)], independent of the nature of the *casus belli*."<sup>39</sup>

The usual test of whether a dispute is a "labor dispute" within the Act has come, therefore, to center on the existence of a present or potential employment

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32. *Id.* § 113(c).

33. *Id.* § 104.

34. *Id.* § 113(a).

35. *See, e.g.,* Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F. Supp. 807, 823 (W.D. Mo. 1937) (Otis, J., dissenting from the opinion of a three-judge district court), *vacated*, 304 U.S. 243 (1938); *see also* Utilities Services Eng'g, Inc. v. Colorado Bldg. & Constr. Trades Council, 549 F.2d 173, 176 (10th Cir. 1977) (finding labor dispute under either § 13(a) or § 13(c)).

36. *See, e.g.,* Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 102 S. Ct. 2673, 2679-81 (1982); Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365, 369-70 (1960); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 560-63 (1938); Khedivial Lines, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49, 50-51 (2d Cir. 1960). At least one court expressly rejected the literal application of § 13(a), on the grounds that it would lead to "absurd consequences." Ashley, Drew & N. Ry. v. United Transp. Union, 625 F.2d 1357, 1365 (8th Cir. 1980).

37. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 560-63 (1938).

38. *Id.* at 561.

39. Comment, *Labor Law—When a "Labor Dispute" Exists Within the Meaning of the Norris-LaGuardia Act*, 36 MICH. L. REV. 1146, 1150 (1938).

relationship and a dispute connected to that relationship, rather than on the union's motivation.<sup>40</sup> Nevertheless, commentators and courts have put forward the argument, based on the concepts underlying the Act, that a strike must be motivated by economic self-interest to come within the Act's definition of a "labor dispute."<sup>41</sup>

The chief justification for preventing the federal judiciary from intervening in labor disputes was the belief that labor should be allowed to use its economic power to promote its interests, just as business does, even if this entails economic harm to other parties.<sup>42</sup> This concept supported giving labor the right to organize and use the resources at its disposal in "free competition with concentrated capital."<sup>43</sup> However, the proponents of the Act did not necessarily intend for unions to be free to use the weapons at their disposal for purposes other than promoting, directly or indirectly, their economic interests.<sup>44</sup> A seminal work on the abuses of the labor injunction by Professors Frankfurter (later Justice Frankfurter) and Greene, containing an argument for the adoption of a bill they had drafted that was later enacted in modified form as the Norris-LaGuardia Act,<sup>45</sup> indicates that Frankfurter and Greene intended their bill to merely define "the outposts of the concept of 'self-interest'" within which unions could use the economic power at their disposal.<sup>46</sup> Moreover, Professor Charles O. Gregory, writing in 1949, considered the concept that intentional infliction of economic harm by a union should be permitted only for the purpose of "pursuing economic interests"<sup>47</sup> to be central to the Act and proposed the use of an "economic interest test" for determining whether the protections of the Act should apply.<sup>48</sup>

The Act itself, however, does not explicitly state that an economic self-interest motive is required for its protections, and there is not much support for the economic self-interest test in the congressional legislative history. While the congressional debates on the Act indicate that Congress' primary concern was to protect organized labor's efforts to improve wages and working conditions, no mention was made of an economic self-interest requirement.<sup>49</sup> Moreover, even in the analysis of Frankfurter and Greene, economic self-interest is treated more as an underlying concept than as a test of the application of their proposed bill.<sup>50</sup>

The courts refused for a considerable time to adopt the economic self-interest test. For example, the Supreme Court, in *New Negro Alliance v. Sanitary Grocery*

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40. Both the majority and the dissenters in *Jacksonville* cited the test as being whether the employment relationship is the "matrix of the controversy." 102 S. Ct. 2673, 2681, 2687-88 (1982) (quoting *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 147 (1942) (holding no labor dispute existed in controversy between fish packer and association of fishermen who were independent contractors)).

41. See, e.g., *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649, 654 (5th Cir. 1966). The most complete development of this concept may be found in C. GREGORY, *LABOR AND THE LAW* 158-99 (2d rev. ed. 1961).

42. See F. FRANKFURTER & N. GREENE, *supra* note 24, at 203-05.

43. See *id.* at 204.

44. See *id.* at 199-226.

45. *Id.*

46. *Id.* at 215.

47. C. GREGORY, *LABOR AND THE LAW* 193 (2d rev. ed. 1961).

48. *Id.* at 156-57.

49. See generally the debates in the Senate, 75 CONG. REC. 4914 *passim* (1932), and in the House, 75 CONG. REC. 5462-515 (1932).

50. See F. FRANKFURTER & N. GREENE, *supra* note 24, at 199-226; see also Recent Developments, *Railroad Secondary Boycotts: Railway Labor Act Versus Norris-LaGuardia*, 42 WASH. L. REV. 935, 937 (1967).

Co.,<sup>51</sup> found that picketers from a community organization protesting discriminatory hiring practices were engaged in a labor dispute, without any analysis of the tenuous economic interests of the picketers.<sup>52</sup> The first explicit use of an economic self-interest test under the Act occurred in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad*.<sup>53</sup> In *Atlantic Coast Line* the United States Court of Appeals for the Fifth Circuit found a secondary boycott by striking railroad workers of a terminal company that serviced the trains to be under the anti-injunction protections of the Act.<sup>54</sup> While recognizing that a literal reading of the Act would give this result, the court preferred to rely on the economic self-interest test proposed by Professor Gregory.<sup>55</sup> This approach has generated substantial support, at least for its application to cases dealing with picketing and boycotts of employers who are not being struck.<sup>56</sup>

Thus, two major interpretations of the Norris-LaGuardia Act have emerged. The first views the Act as applying whenever a section 13(c) labor dispute, broadly construed, exists. This view requires a finding that the dispute is reasonably connected to a present or potential employment relationship.<sup>57</sup> The second approach argues that implicit in the Act is the requirement that a union may freely use its economic power only within the broadly and hazily defined scope of its own and its members' economic self-interest.<sup>58</sup> The issue of whether the Act applies to politically motivated strikes depends largely on which interpretation of the Act is adopted.

### III. APPLICATION OF THE ACT TO POLITICALLY MOTIVATED DISPUTES

The application of the Norris-LaGuardia Act to politically motivated work stoppages presents novel problems for which there are no clear solutions in the Act itself or in prior case law.<sup>59</sup> The analysis which follows suggests that neither the majority nor the dissent in *Jacksonville* has satisfactorily solved these problems. The majority's dual dispute analysis is unrealistic and inconsistent. Characterization of the dispute as a type of boycott subject to sanctions under section 8(b)(4) of the National Labor Relations Act<sup>60</sup> would be preferable. On the other hand, the dissent's economic self-interest theory finds little support in the Act or in the background of the Act. Therefore, it would be preferable to recognize explicitly that the Act, by its own terms, applies to labor disputes—disputes between management and labor—regardless of the motivation of the parties.

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51. 303 U.S. 552 (1938).

52. *Id.* at 562.

53. 362 F.2d 649 (5th Cir. 1966).

54. *Id.*

55. *Id.* at 653-54.

56. See, e.g., *Ashley, Drew & N. Ry. v. United Transp. Union*, 625 F.2d 1357 (8th Cir. 1980); *Western Md. R.R. v. System Bd. of Adjustment*, 465 F. Supp. 963 (D. Md. 1979); *Southern Ry. v. Brotherhood of Ry. Clerks*, 458 F. Supp. 1189 (D.S.C. 1978).

57. See *supra* text accompanying notes 9-40.

58. See *supra* text accompanying notes 5-48.

59. See *supra* note 22 and text accompanying notes 29-56.

60. 29 U.S.C. § 158(b)(4) (1976).

### A. *The Dual Dispute Analysis of Jacksonville*

In finding that the ILA work stoppage in *Jacksonville* was a "labor dispute" within the meaning of the Norris-LaGuardia Act, the Court's opinion relies on the theory that two controversies were present in the dispute. The first of these is the "underlying dispute," . . . the event or condition that triggers the work stoppage."<sup>61</sup> In *Jacksonville* this was the dispute between the ILA and the Soviet Union over Soviet foreign policy. The second is the "parties' dispute over whether the no-strike pledge prohibits the work stoppage at issue."<sup>62</sup>

The Court assumed that a section 13(c) labor dispute must exist for the Act to apply.<sup>63</sup> Since the "underlying dispute" in *Jacksonville* concerned the policy of the Soviet Government rather than "terms or conditions of employment," it was not a section 13(c) labor dispute. However, under the Court's analysis, the terms of the collective-bargaining agreement, specifically the no-strike agreement, were "terms or conditions of employment," and hence the dispute over the no-strike clause was a section 13(c) labor dispute.<sup>64</sup> In the Court's view, once a "labor dispute" is found, the existence of an additional, political, nonlabor dispute is irrelevant.<sup>65</sup> Apart from this tortured application of section 13(c), the Court found further reasons for rejecting the economic self-interest test: first, the congressional debates and reports on the Act made no mention of an economic self-interest test;<sup>66</sup> and, second, attempting to distinguish between economically and politically motivated strikes would create difficult line-drawing problems.<sup>67</sup>

The Court's analysis is simplistic and open to criticism on a number of grounds. As the dissenting Justices point out, the Court's characterization of the dispute as both a "labor" dispute and a "political" dispute is inconsistent.<sup>68</sup> Moreover, the Court's analysis is open to more substantive criticism. Realistically, there was no substantial dispute between the employer and the union over the applicability of the no-strike clause in the contract. The no-strike clause in the contract in question was all-inclusive in its scope;<sup>69</sup> it is evident that the union simply decided to violate the clause. Thus, while the no-strike clause certainly may have been a "term or condition of employment," it is not at all clear that there was any dispute about the clause which would bring the work stoppage within section 13(c).

Actually, the Court's analysis, while couched in terms of section 13(c), approaches more nearly a literal application of section 13(a). The Court suggested that even in the absence of a dispute over the no-strike clause a labor dispute would

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61. 102 S. Ct. 2673, 2680 (1982).

62. *Id.*

63. *Id.* at 2679-81.

64. *Id.* at 2680.

65. *Id.*

66. See *id.* at 2682-84. But see Chief Justice Burger's analysis of the legislative history, *id.* at 2688 n.4 (Burger, C.J., dissenting), and the discussion of his analysis, *infra* text accompanying notes 100-01.

67. See 102 S. Ct. 2673, 2684-85 (1982).

68. *Id.* at 2689-90 (Burger, C.J., and Powell, J., dissenting).

69. The ILA agreed that during the contract it would engage in no "strike of any kind or degree whatsoever, . . . for any cause whatsoever." *Id.* at 2678.

have been found since, "[r]egardless of the political nature of the Union's objections to handling Soviet-bound cargo, these objections were expressed in a work stoppage by employees against their employer, which focused on particular work assignments. Thus, . . . the employer-employee relationship would be the matrix of the controversy."<sup>70</sup> Thus the Court implied that any work stoppage by employees is protected by the Act, a result that conforms with section 13(a) better than with section 13(c).

The Court's holding in *Jacksonville* is obviously very broad. If the Court is not applying a literal interpretation of section 13(a), it is at least using such a broad interpretation of section 13(c) that it is taking literally the language from *New Negro Alliance* stating that "[t]he Act does not concern itself with the background or the motives of the dispute."<sup>71</sup>

### B. *The Dispute in Jacksonville as a Secondary Boycott*

The Court appears to derive its dual dispute analysis from *Buffalo Forge Co. v. United Steelworkers*.<sup>72</sup> In *Buffalo Forge* the Court used a similar analysis to find that while the issue of whether a sympathy strike<sup>73</sup> violated a no-strike clause was arbitrable, the "underlying dispute" was not arbitrable and hence the sympathy strike itself could not be enjoined.<sup>74</sup> Regardless of the validity of this analysis in the *Buffalo Forge* situation, it is of little use in initially determining whether the Act applies. The analysis simply avoids the issue of whether a substantial dispute connected to the employment relationship is present.

In addressing that issue it is necessary first to characterize the dispute realistically. However, the ILA work stoppage does not fall neatly into any of the categories currently being used. While it could be characterized as a protest of Soviet policy unconnected to the employment relationship, it can also be seen as an attempt to exert pressure on employers and other affected parties to stop dealing with the Soviet Union—in other words, a type of secondary boycott.<sup>75</sup> In the secondary boycott cases arising out of its work stoppages, the ILA has argued that its actions were directed solely against the Soviet Union, and at least one court has agreed.<sup>76</sup> Most courts, however, including the Supreme Court in *International Longshoremen's Association*

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70. *Id.* at 2681 n.12.

71. 303 U.S. 552, 561 (1938).

72. 428 U.S. 397 (1976).

73. In *Buffalo Forge* production and maintenance workers had gone on strike in sympathy with striking office and technical employees from another union. *Id.*

74. *Id.* at 405-08.

75. The National Labor Relations Act, 29 U.S.C. § 158(b)(4)(i) (1976), makes it unlawful for unions: to engage in, or to induce or encourage any individual . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; . . . where in either case an object thereof is—

. . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease dealing with any other person . . . .

76. See *Walsh v. International Longshoremen's Ass'n*, 488 F. Supp. 524 (D. Mass.), *aff'd*, 630 F.2d 864 (1st Cir. 1980).



*v. Allied International, Inc.*, have found the work stoppages to be secondary boycotts directed at both employers and neutral parties.<sup>77</sup>

Characterizing the work stoppage as a secondary boycott makes explicit the tension between *Jacksonville* and *Allied International*. An essential element of a secondary boycott is the pressure it places on a neutral secondary employer with whom the union has no dispute.<sup>78</sup> Thus, in *Allied International* the Court found that there was no dispute between the union and the employers.<sup>79</sup> The inconsistency between this finding and the Court's holding in *Jacksonville* is not necessarily fatal to the *Jacksonville* decision. To explain this inconsistency, however, the Court would have to admit that it is giving a broader meaning to the term "labor dispute" in the context of the Norris-LaGuardia Act than in the context of secondary boycotts. This the Court refused to do.<sup>80</sup>

Nevertheless, the position that "labor dispute" has a broader meaning under the Norris-LaGuardia Act is supportable. Prior to passage of the Taft-Hartley Act in 1947, which made secondary boycotts an unfair labor practice,<sup>81</sup> several courts found that secondary boycotts fell within the scope of the Norris-LaGuardia Act, which had been passed 15 years earlier.<sup>82</sup> Moreover, the issuance of injunctions against secondary boycotts in the *Duplex Printing Press* and *Bedford Cut Stone* cases was one of the practices against which the Norris-LaGuardia Act was directed.<sup>83</sup> While the Taft-Hartley Act opened unions engaging in secondary boycotts to unfair labor practice charges, suits for damages, and injunctions obtained through the National Labor Relations Board, there is no explicit indication in the Taft-Hartley Act of an intention to repeal the applicability of the Norris-LaGuardia Act to secondary boycotts.<sup>84</sup> It is clear that the Norris-LaGuardia Act was passed to remove federal injunctive power, even from illegal union conduct in a labor dispute, so long as the conduct does not entail fraud or violence.<sup>85</sup>

Thus, the conclusion of the Court in *Jacksonville* and *Allied International*—that the work stoppage was a secondary boycott but still protected by the Norris-LaGuardia Act—is defensible. However, it raises substantial questions that the Court simply avoided by the means of its dual dispute analysis.

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77. See *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982); *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445 (5th Cir. 1980).

78. See R. GORMAN, *BASIC TEXT ON LABOR LAW* 240 (1976).

79. 456 U.S. 212, 222 (1982).

80. See 102 S. Ct. 2673, 2680 n.11 (1982).

81. 29 U.S.C. § 158(b)(4) (1976).

82. See, e.g., *United States v. Hutcheson*, 312 U.S. 219 (1941); *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615 (8th Cir. 1941).

83. See *supra* text accompanying notes 23–28.

84. See the discussion of the changes in treatment of secondary boycotts in *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 628–32 (1967).

85. This was the significance of removing the Clayton Act's requirement that strikes be "lawful" to be protected. See F. FRANKFURTER & N. GREENE, *supra* note 24, at 219–20.

### C. *The Economic Self-Interest Theory*

Chief Justice Burger's dissenting opinion in *Jacksonville*,<sup>86</sup> joined by Justice Powell and—in Part I, dealing with the application of the Act to politically motivated disputes—by Justice Stevens, focused on the language in section 13(c) of the Norris-LaGuardia Act that defines labor disputes as those “concerning terms or conditions of employment.”<sup>87</sup> The dissent characterized the work stoppage as a purely political protest with no connection to terms or conditions of employment.<sup>88</sup> Chief Justice Burger whole-heartedly adopted the economic self-interest test of the Act's applicability.<sup>89</sup> He cited *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad* to support the position that unions are protected by the Act only “when they act to advance the economic interests of their members”<sup>90</sup> and found that “[n]o economic interests of union members are involved; indeed, the union's policy is contrary to its members' economic interests since it reduces the amount of available work.”<sup>91</sup> Since, moreover, employers cannot resolve political disputes by conceding to union demands, the dissent concluded that “politically motivated strikes are outside the coverage of the Norris-LaGuardia Act.”<sup>92</sup>

The dissent's characterization of the facts of the dispute as depicting a purely political protest is certainly supportable.<sup>93</sup> On the basis of that characterization no section 13(c) labor dispute would be found if a more restrictive interpretation of the section than the majority's were adopted. Thus, the dissenters argued that the work stoppage in *Jacksonville* fell into the category of disputes that are not connected to the employment relationship.<sup>94</sup>

The economic self-interest test espoused by the dissent raises a number of problems, however. The test finds little support in the language or legislative history of the Act.<sup>95</sup> The Act does not refer to a required motivation and, as the Court noted, the legislative history does not support the view that Congress intended to exclude politically motivated strikes per se from the protection of the Act.<sup>96</sup> Responding to criticism during debate that the Act would prohibit federal courts from enjoining political strikes,<sup>97</sup> a supporter of the Act, Representative Oliver, argued that political strikes should not be enjoined.<sup>98</sup> Moreover, proposed amendments to permit courts to enjoin strikes having “an unlawful purpose or . . . an unlawful intent” and to permit the United States to sue for an injunction were voted down overwhelmingly.<sup>99</sup> Simi-

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86. 102 S. Ct. 2673, 2687–90 (1982) (Burger, C.J., dissenting).

87. 29 U.S.C. § 113(c) (1976).

88. 102 S. Ct. 2673, 2687 (1982) (Burger, C.J., dissenting).

89. *Id.* at 2688.

90. *Id.* (citing *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir. 1966)).

91. 102 S. Ct. 2673, 2688 (1982).

92. *Id.*

93. *But see supra* text accompanying notes 75–77.

94. 102 S. Ct. 2673, 2688 (1982) (Burger, C.J., dissenting).

95. *See supra* text accompanying notes 49–50.

96. 102 S. Ct. 2673, 2682–84 (1982).

97. *See* 75 CONG. REC. 5471–73 (1932).

98. *Id.* at 5480–81.

99. *Id.* at 5507.

larly, in 1947 Congress rejected amendments to the National Labor Relations Act that would have removed Norris-LaGuardia Act protections from strikes called as a result of "disagreement with some government policy."<sup>100</sup>

As Chief Justice Burger pointed out in his dissent, all of the rejected amendments swept broadly and would have excluded from the Act some strikes fitting within the economic self-interest test.<sup>101</sup> Therefore, the legislative history does not conclusively establish that Congress intended to include political strikes within the Act. However, the repeated rejection of limiting amendments and Congress' refusal to act on the criticism that the Act could prevent the enjoining of political strikes<sup>102</sup> hardly support the view that Congress intended to exclude political strikes or adopt an economic self-interest test.

Moreover, section 2 of the Act indicates that the policy of the Act is to protect workers "from the interference, restraint, or coercion of employers of labor, . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>103</sup> The legislative history indicates that the "mutual aid or protection" language was intended to recognize workers' right to organize over issues "affecting wages, conditions of labor, and the welfare of labor generally."<sup>104</sup> The Supreme Court has construed similar language in section 7 of the National Labor Relations Act<sup>105</sup> to protect much arguably political conduct.<sup>106</sup> Despite this legislative history, the dissenters argued that the plain language of section 13(c) adopts the economic self-interest test.<sup>107</sup> Whatever else one may say about the meaning of the Act, however, it should be clear that it is not "plain."

The cases that have applied the economic self-interest test have done so almost uniformly in the context of picketing by railroad workers of nonstruck railroads.<sup>108</sup> In this context the test may have some use for determining whether the picketing has any substantial connection with the picketers' employment through the "alignment" of the struck and nonstruck companies.<sup>109</sup> In these cases it is essentially a factual test. It should not be converted into a motivation test and extended to cover a primary work stoppage by a company's employees.

As the *Jacksonville* Court noted, the application of an economic interest test would cause serious problems.<sup>110</sup> Legal tests focusing on the motivation of the parties are always difficult to apply and should especially be avoided in the context of the

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100. 102 S. Ct. 2673, 2683-84 (1982) (quoting H.R. 3020, 80th Cong., 1st Sess. § 2(13) (1947), reprinted in NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 168 (1974)).

101. 102 S. Ct. 2673, 2688 n.4 (1982) (Burger, C.J., dissenting).

102. See *id.* at 2683-84.

103. 29 U.S.C. § 102 (1976).

104. S. REP. NO. 163, 72d Cong., 1st Sess. 9 (1932).

105. 29 U.S.C. § 157 (1976).

106. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (holding union distribution of literature urging members to oppose state right-to-work constitutional amendment and to support candidates favorable to labor protected by § 7 of the National Labor Relations Act).

107. 102 S. Ct. 2673, 2688 (1982) (Burger, C.J., dissenting).

108. See *Ashley, Drew & N. Ry. v. United Transp. Union*, 625 F.2d 1357 (8th Cir. 1980) and cases cited therein at 1363.

109. *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649, 655 (5th Cir. 1966).

110. 102 S. Ct. 2673, 2684 (1982).

Norris-LaGuardia Act. The abuses the Act was passed to correct arose largely out of federal judges' practice of determining whether or not to enjoin a strike by assessing whether the union's motives or objectives were "legitimate."<sup>111</sup> The attempt to read a new legitimate-objectives test into the Act is therefore questionable. Moreover, the use of an economic interest test would cause difficult line-drawing problems, especially in cases of mixed motives.<sup>112</sup> While these problems may not be insurmountable, it would be undesirable for the trial court's jurisdiction to issue an injunction to depend on the judge's interpretation of whether the union's motive is "economic."

Finally, the central concept of the economic interest theory—that only a relatively direct economic interest of the union justifies the infliction of economic harm<sup>113</sup>—may now have been called into question by the Court. In *NAACP v. Claiborne Hardware Co.*,<sup>114</sup> the Supreme Court recently found that an NAACP boycott of white merchants to protest race discrimination fell within the protection of the first amendment.<sup>115</sup> Admittedly, the Court rejected a similar claim by the ILA in *Allied International*,<sup>116</sup> and extrapolation from other fields of law to labor law is risky, especially in the first amendment context. However, the Court recognized in *Claiborne Hardware* that nonlabor organizations may inflict economic harm as part of a campaign to communicate their political views.<sup>117</sup> In the absence of clear congressional intent to the contrary, it is difficult to see why a union's use of a work stoppage to communicate its political views should be considered a strike with an illegitimate objective from which the protections of the Act should be removed, solely because of the strike's political motive.<sup>118</sup>

#### D. The Act and Federal Labor Policy in the Context of Politically Motivated Strikes

The remedial policy, the broad language, and the legislative history of the Act support the *Jacksonville* Court's view that a broad interpretation of the Act is needed to achieve its purpose of "taking the federal courts out of the labor injunction business."<sup>119</sup> By effect and implication, however, the Court's interpretation is very broad indeed. Since, in the Court's view, the workers' refusal to work might itself constitute a "labor dispute,"<sup>120</sup> the Act becomes self-defining for the union, which may claim the Act's protection simply by going on strike. This view may seem surprising, but it draws considerable support from the language of section 13(a) of the

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111. F. FRANKFURTER & N. GREENE, *supra* note 24, at 168-70, 174-75; see, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

112. See 102 S. Ct. 2673, 2684 n.19 (1982).

113. See C. GREGORY, *LABOR AND THE LAW* 193 (2d rev. ed. 1961).

114. 102 S. Ct. 3409 (1982).

115. *Id.* at 3423-25.

116. 456 U.S. 212 (1982).

117. 102 S. Ct. 3409, 3425-27 (1982).

118. It is interesting to note that in the European countries, which have had much more experience with political strikes than the United States, legal attitudes towards political strikes vary widely. See Otto Kahn-Freund, *Pacta Sunt Servanda—A Principle and Its Limits: Some Thoughts Prompted by Comparative Labour Law*, 48 TULANE L. REV. 894 (1974).

119. *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960).

120. 102 S. Ct. 2673, 2681 n.12 (1982).

Act and from the Act's broad policy of protecting union efforts to improve "the welfare of labor generally."<sup>121</sup> Moreover, it is at least arguable that a union and its members have a legitimate interest in proceeding with a politically motivated work stoppage.<sup>122</sup>

Nevertheless, the *Jacksonville* Court's broad interpretation of the Act is open to criticism that goes deeper than an attack on the inconsistency of the Court's analysis or a dispute about the proper reading of the language of the Act. Underlying the economic self-interest test proposed by the dissent is a view of federal labor policy, and the Act's place within that policy, which differs radically from that of the majority. The dissenting opinion sweeps as widely as the majority opinion, but in the opposite direction. Since, in the view of the dissenting Justices, the protections of the Act apply only to "union organizational efforts and efforts to improve working conditions"<sup>123</sup> that directly advance the economic interests of their members, sympathy strikes such as the one in *Buffalo Forge*<sup>124</sup> would fall outside of the Act. In the *Jacksonville* dissenters' view it would also be possible to enjoin any strike, pending arbitration, that violated a no-strike clause of a current contract.<sup>125</sup> Since no-strike clauses and agreements to arbitrate disputes are now a matter of course in virtually all contracts,<sup>126</sup> the dissenters would effectively limit the application of the Act to strikes when no contract is in effect.

A number of policy considerations underlie the dissenters' desire to limit the application of the Act. These include the desirability of preventing disruptions of labor peace and avoiding the damage to employers that could be inflicted by strikes over issues the employer is powerless to resolve.<sup>127</sup> These concerns are valid, even though the employer is not entirely without a remedy.<sup>128</sup> These concerns, however, do not justify a restrictive interpretation of a broad and remedial piece of legislation like the Norris-LaGuardia Act. The fundamental justification for limiting the application of the Act is the view that changes in the relative strength of labor unions and in the attitude of the federal judiciary towards them, together with modifications of federal labor policy expressed principally in the Labor Management Relations Act of 1947,<sup>129</sup> support limiting the application of the Norris-LaGuardia Act to situations in which its "core purpose"—protection of union organizational and economic strikes—is implicated.<sup>130</sup>

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121. S. REP. NO. 163, 72d Cong., 1st Sess. 9 (1932); see *supra* text accompanying notes 103–06.

122. See *supra* text accompanying notes 113–18.

123. 102 S. Ct. 2673, 2688 (1982) (Burger, C.J., dissenting).

124. While in *Buffalo Forge* all parties assumed that the sympathy strike was a "labor dispute" within the meaning of the Act, Justice Stevens noted in his dissent that no economic interests of the production workers were at stake. 428 U.S. 397, 429 (1976).

125. 102 S. Ct. 2673, 2689–90 (1982) (Burger, C.J., dissenting).

126. A 1974 survey found grievance procedures in 98% of sample contracts, arbitration agreements in 96% of sample contracts, and no-strike clauses in 91% of sample contracts. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 32, 37, 90 (8th ed. 1975).

127. See 102 S. Ct. 2673, 2688–89 (1982) (Burger, C.J., dissenting).

128. See *infra* text accompanying notes 164–71.

129. 29 U.S.C. §§ 141–197 (1976).

130. See *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 249–53 (1970); see also *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 415–17 (1976) (Stevens, J., dissenting).

The policy of the Labor Management Relations Act (LMRA) favors conciliation of labor disputes and permits both unions and employers to sue to enforce collective-bargaining agreements.<sup>131</sup> The LMRA thus created a potential conflict with the sweeping anti-injunction provisions of the Norris-LaGuardia Act, but Congress has given no explicit guidance on how this conflict should be resolved.<sup>132</sup> In a series of opinions the view has been put forward that the Norris-LaGuardia Act should be accommodated to the policy of the LMRA.<sup>133</sup> While these opinions have dealt with the issue of whether a strike violating a no-strike clause may be enjoined pending arbitration, this view of the Norris-LaGuardia Act's place in current federal labor policy appears to influence the *Jacksonville* dissent's view of the Act's applicability to political strikes. Thus, the dissenters in *Jacksonville* would apply the economic self-interest test to limit the protection of the Norris-LaGuardia Act to "union organizational efforts and efforts to improve working conditions"<sup>134</sup>—the "core purpose" of the Act. Under this line of reasoning, such a restrictive interpretation of the Act is justified by changes in conditions and changes in federal labor policy that have taken place since the passage of the Act in 1932.

A full scale application of this view of the Act would threaten to undercut the broad remedial policy and purpose of the Act almost as severely as the *Duplex Printing Press* line of cases undercut the Clayton Act.<sup>135</sup> As illustrated by the case of *United States Steel Corp. v. United Mine Workers*,<sup>136</sup> even the central concerns of the Act may be implicated by strikes resulting from political or mixed motives. In *United Mine Workers* the trial court issued an injunction forbidding strikes of any kind. This injunction was ordered after a number of strikes over arbitrable issues had arisen during the tenure of the contract.<sup>137</sup> Three weeks after the trial court's order, the union walked out to protest the importation of South African coal by a local utility company, and the trial court held the union in contempt.<sup>138</sup> The Court of Appeals reversed, finding that the trial court's use of the injunction threatened to revive the type of "government by injunction" that the Norris-LaGuardia Act was intended to prevent.<sup>139</sup>

The *United Mine Workers* case also illustrates the difficulty of applying an economic motivation test. Are the union's motives in protesting the importation of South African coal economic (to protest competition with imported coal) or political (to protest South African racial and labor policy)? What if the amount of coal being imported is minimal? Or is the union's real motive simply to apply economic pressure

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131. See 29 U.S.C. §§ 171, 185 (1976).

132. See Freed, *Injunctions Against Sympathy Strikes: In Defense of Buffalo Forge*, 54 N.Y.U.L. REV. 289, 291-96, 307-23 (1979).

133. See *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 415-22 (1976) (Stevens, J., dissenting); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 215 (1962) (Brennan, J., dissenting).

134. 102 S. Ct. 2673, 2688 (1982) (Burger, C.J., dissenting).

135. See *supra* text accompanying notes 25-27.

136. 519 F.2d 1236 (5th Cir. 1975).

137. *Id.* at 1239-40.

138. *Id.* at 1240-41.

139. *Id.* at 1245.

on the employer through a strike over an issue not subject to arbitration and hence not enjoined pending arbitration under *Buffalo Forge*? Should federal jurisdiction to enjoin the strike depend on a single United States District Court judge's opinion on these matters, given the broad policy of the Act? The Court in *Jacksonville* thought not.<sup>140</sup>

Obviously, as a policy matter, the wisdom of denying injunctive relief in cases arising from political strikes may be questioned. However, it would not be advisable for the Court to adopt a restrictive interpretation of a statute that Congress passed with the express purpose of removing the federal judiciary from labor disputes, especially after a prior law with the same purpose was rendered ineffective by judicial action. Congress rather than the Court should decide whether the application of the Act should be limited or the Act itself discarded as outmoded and unnecessary.

In conclusion, the Court's broad interpretation of the Norris-LaGuardia Act is correct. The Court's interpretation should rest explicitly on the policy of the Act rather than on an unrealistic dual dispute analysis, however.<sup>141</sup> The policy of the Act is to "tak[e] the federal courts out of the labor injunction business."<sup>142</sup> This policy requires a broad definition of the term "labor dispute," regardless of whether section 13(a) or 13(c) of the Act is held to be controlling. A reasonable interpretation would be that any dispute between management and labor interests concerning a present or potential employment relationship is a labor dispute.<sup>143</sup> A test of this type would be simple to apply and consistent with the policy and purpose of the Act. It would also make clear that the workers' or union's motivations are irrelevant in the context of the Norris-LaGuardia Act, and that a work stoppage by employees is necessarily a labor dispute within the meaning of the Act.

#### IV. REAFFIRMATION OF *BUFFALO FORGE* IN THE CONTEXT OF POLITICALLY MOTIVATED STRIKES

The second issue in *Jacksonville* was whether the strike could be enjoined pending arbitration. Essentially this raised the question of whether *Buffalo Forge* should be overruled. This issue is highly controversial, and the positions of the majority and dissent deserve comment. Nevertheless, this issue has already received detailed treatment elsewhere,<sup>144</sup> and, therefore, the discussion here will be limited.

In the 1976 *Buffalo Forge* decision, the Supreme Court held that a sympathy strike cannot be enjoined pending arbitration, despite a no-strike clause in the contract, because the strike is not over an arbitrable issue. The employer may, however, compel arbitration of the issue of whether the strike violates the no-strike clause.<sup>145</sup>

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140. 102 S. Ct. 2673, 2684 n.19 (1982).

141. See *supra* subpart III(A) and text accompanying notes 103-06 & 119-21.

142. *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960).

143. This test is similar to the traditional "matrix of the controversy" test. See *supra* note 40 and accompanying text. However, this test focuses explicitly on the relationship between the parties, rather than on their motivations or the subject of the dispute.

144. For an analysis of the extensive literature and a defense of the *Buffalo Forge* decision, see Cantor, *Buffalo Forge and Injunctions Against Employer Breaches of Collective Bargaining Agreements*, 1980 Wis. L. REV. 247.

145. See *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 405-10 (1976).

With this holding, *Buffalo Forge* placed a significant limitation on the holding in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*.<sup>146</sup> In *Boys Markets* the Court had held that when a union strikes over an issue subject to arbitration under the contract, the anti-injunction provisions of the Norris-LaGuardia Act must be accommodated with the federal policy embodied in the Labor Management Relations Act favoring enforcement of labor contracts and arbitration of disputes.<sup>147</sup> The Court in *Boys Markets* had held, therefore, that such strikes may be enjoined pending arbitration of the dispute.<sup>148</sup>

Although the employer and the United States Solicitor General, in an amicus curiae brief, attempted to distinguish *Jacksonville* from *Buffalo Forge* on the grounds that the dispute in *Jacksonville* was over management rights or work conditions clauses in the contract,<sup>149</sup> the attempt was untenable. The underlying dispute in *Jacksonville*, like that in *Buffalo Forge*, was clearly outside the ability or authority of an arbitrator to resolve. It is here that the second half of the Court's dual dispute analysis comes into play. Since the underlying dispute was with the Soviet Union, the strike was not over an arbitrable issue and could not be enjoined.<sup>150</sup> Although the Court made this dual dispute analysis explicit in *Jacksonville*, it was implicit in the Court's finding in *Buffalo Forge* that the strike itself was not over an arbitrable issue even though the dispute over the application of the no-strike clause was arbitrable.<sup>151</sup> Therefore, the sympathy strike in *Buffalo Forge* and the political strike in *Jacksonville* are indistinguishable or, as Justice O'Connor put it in her markedly unenthusiastic concurrence, "[u]nless the Court is willing to overrule *Buffalo Forge*, the conclusion reached by the Court in this case is inescapable."<sup>152</sup>

The dissenting Justices were very willing to overrule *Buffalo Forge*. While Justice Stevens simply referred back to his dissenting opinion in *Buffalo Forge*,<sup>153</sup> Chief Justice Burger (who had voted with the majority in *Buffalo Forge*) and Justice Powell focused on the inconsistency of the Court's dual dispute analysis and the inconsistency between *Jacksonville* and *Allied International*.<sup>154</sup> The dissenters also argued that *Buffalo Forge* and *Jacksonville* "cannot be reconciled with labor law policy of encouraging industrial peace through arbitration."<sup>155</sup>

The internal inconsistency of the Court's opinion, particularly its characterization of the work stoppage as a labor dispute for purposes of the Norris-LaGuardia Act and as a political dispute for purposes of the *Buffalo Forge* issue,<sup>156</sup> is easy to criticize. But this inconsistency is largely a result of the Court's unnecessary use of the dual dispute analysis to support its conclusion that the Act applies to political

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146. 398 U.S. 235 (1970).

147. *Id.* at 250-54.

148. *Id.*

149. 102 S. Ct. 2673, 2685-86 (1982).

150. *Id.*

151. 428 U.S. 397, 405 (1976).

152. 102 S. Ct. 2673, 2687 (1982).

153. *Id.* at 2690 (Stevens, J., dissenting).

154. *Id.* at 2689 (Burger, C.J., dissenting), 2689-90 (Powell, J., dissenting).

155. *Id.* at 2690 (Powell, J., dissenting).

156. *See id.* at 2689 (Burger, C.J., dissenting).



disputes. If the strike is realistically characterized as a secondary boycott, the Court's result can be reached either through a literal application of section 13(a) or by applying a broad interpretation of the Act.<sup>157</sup> Therefore, the Court's fancy footwork does not render its conclusion erroneous, nor does the apparent inconsistency between the *Jacksonville* and *Allied International* decisions. That one activity may be an illegal secondary boycott under section 8(b)(4) of the National Labor Relations Act<sup>158</sup> and yet not subject to an injunction because of the Norris-LaGuardia Act is not an aberration in the Court's opinion, but is simply a reflection of the statutory scheme enacted by Congress. The intent of the Norris-LaGuardia Act was to prohibit federal injunctive relief in cases arising out of labor disputes, regardless of whether the activity to be enjoined was criminal or violated labor law policy.<sup>159</sup> The inconsistency, assuming one exists, is for Congress rather than the Court to resolve.

The most forceful objection to the Court's continued reliance on *Buffalo Forge* is simply that *Buffalo Forge* was wrongly decided because it undercuts the federal labor policy favoring arbitration and the enforcement of labor contracts. Overruling *Buffalo Forge* would promote labor peace by preventing or quickly cutting off any work stoppage during the life of a contract containing no-strike and arbitration clauses. As the Court pointed out in *Buffalo Forge*, however, this would not necessarily promote arbitration of disputes, since the union would have no grievance to take to arbitration and the court, in deciding whether to issue an injunction, would essentially take over the arbitrator's role of interpreting the contract.<sup>160</sup> Moreover, both the Court's decision in *Boys Markets* and Justice Brennan's dissent in *Sinclair Refining Co. v. Atkinson*<sup>161</sup> (on which his opinion in *Boys Markets* was based) included a limitation on the availability of injunctions pending arbitration for strikes "over a grievance which both parties are contractually bound to arbitrate."<sup>162</sup>

Although a full discussion of the policy arguments for and against overruling *Buffalo Forge* is beyond the scope of this Case Comment, it appears that the Court is acting with justified caution in refusing to limit the application of the Norris-LaGuardia Act in the absence of any specific congressional intent supporting a limitation. Nevertheless, judging by the frequent shifts in the opinions of the Court and individual Justices on the issue, this aspect of the Court's decision in *Jacksonville* appears likely to generate continuing controversy.<sup>163</sup>

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157. See *supra* text accompanying notes 34-35 & 78-84.

158. 29 U.S.C. § 158(b)(4) (1976).

159. F. FRANKFURTER & N. GREENE, *supra* note 24, at 199-226.

160. 428 U.S. 397, 410-12 (1976).

161. 370 U.S. 195 (1962).

162. 398 U.S. 235, 254 (1970) (quoting *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)).

163. In 1962 the Court held in *Sinclair* that strikes during an agreement are protected by the Norris-LaGuardia Act. 370 U.S. 195 (1962). In 1970 it reversed itself in *Boys Markets*, adopting Justice Brennan's dissent in *Sinclair*. 398 U.S. 235 (1970). In 1976 it refined *Boys Markets* with *Buffalo Forge*, expressly limiting *Boys Markets* to strikes over arbitrable grievances. 428 U.S. 397 (1976). Four Justices dissented. *Id.* at 413. In *Jacksonville* the Court affirmed *Buffalo Forge*, but Chief Justice Burger moved from the majority in *Buffalo Forge* to the dissent in *Jacksonville*, while Justices Brennan and Marshall moved from the dissent in *Buffalo Forge* to the majority in *Jacksonville* with Justice Marshall delivering the Court's opinion. 102 S. Ct. 2673 (1982).

## V. ALTERNATIVE EMPLOYER REMEDIES

While the injunctive relief denied by *Jacksonville* would certainly be the quickest and most effective remedy for employers in cases arising out of political strikes, a number of other remedies are available. First, under *Buffalo Forge*, an employer may obtain a court order compelling arbitration to determine whether the strike violates the no-strike clause in the agreement—with judicial enforcement of the arbitrator's decision if the union refuses to abide by it.<sup>164</sup> Second, under section 301 of the Labor Management Relations Act,<sup>165</sup> the employer may sue for damages arising out of a union's breach of a no-strike clause. While this remedy will not be quick, it may be an effective deterrent since the union's potential liability could be financially devastating.

Third, under *Allied International*, in cases arising out of a union's refusal to handle goods from a particular source for political reasons, the employer may charge that the union conducted a secondary boycott in violation of section 8(b)(4) of the National Labor Relations Act.<sup>166</sup> Violation of section 8(b)(4) would open the union to a suit for damages under section 303 of the Labor Management Relations Act<sup>167</sup> and a cease-and-desist order from the National Labor Relations Board. More significant, the Board itself must seek an injunction of the strike in federal court under section 10(I) of the National Labor Relations Act if it finds reasonable cause to believe a violation of section 8(b)(4) has occurred.<sup>168</sup> Prior to *Allied International* it was not clear whether charges could be brought under the National Labor Relations Act when the work stoppage was directed against a foreign source, since this Act applies only to disputes that are "in commerce."<sup>169</sup> *Allied International* settled the issue, the Court holding decisively that the union's activity in these cases is "in commerce" and within the jurisdiction of the National Labor Relations Act.<sup>170</sup>

Taken together, *Jacksonville* and *Allied International* have at least clarified the law on employer remedies in cases dealing with union boycotts of goods from foreign sources. The current situation is a definite improvement over that which existed previously, when it was not clear whether either injunctive relief or unfair labor practice charges were available.<sup>171</sup> The employer is not without a remedy, and the

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164. 428 U.S. 397, 405 (1976). Arbitrators have been held to have broad and flexible powers in formulating remedies. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); R. GORMAN, *BASIC TEXT ON LABOR LAW* 591-92 (1976).

165. 29 U.S.C. § 185 (1976).

166. *Id.* § 158(b)(4); *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982).

167. 29 U.S.C. § 187 (1976). Although the main purpose of § 8(b)(4) is the protection of neutral secondary parties, the courts have held that primary employers may also sue for damages under § 303. *United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F.2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897 (1952); *Jaden Elec. v. International Bhd. of Elec. Workers, Local Union No. 211*, 508 F. Supp. 983 (D.N.J. 1981).

168. 29 U.S.C. § 160(I) (1976). While the charging party loses control of the action once it is in the hands of the Board, the reasonable cause standard under § 10(I) is less difficult to meet than the "traditional balancing of equities and hardships." R. GORMAN, *BASIC TEXT ON LABOR LAW* 289 (1976).

169. The Fifth Circuit Court of Appeals denied a request by the Board for an injunction in one of the cases arising from the ILA work stoppage on the grounds that the dispute was not "in commerce." *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445, 450-54 (5th Cir. 1980).

170. 456 U.S. 212, 217 (1982).

171. See cases cited *supra* notes 6 & 8.

available remedies of court-ordered arbitration and Board-obtained injunction may be relatively quick and effective. Thus, the impact of the *Jacksonville* decision may be somewhat diminished.

## VI. CONCLUSION

The Court's holding in *Jacksonville* was strongly suggested by the broad language, remedial policy, and background of the Norris-LaGuardia Act, especially the Act's purpose of remedying judicial circumvention of its predecessor, the Clayton Act. While the Court's dual dispute analysis is inconsistent and unnecessary, its broad interpretation of the Norris-LaGuardia Act finds support both in the Act itself and in a series of Supreme Court decisions interpreting the Act.<sup>172</sup> On the other hand, the economic self-interest test proposed by Chief Justice Burger's dissent derives little support from the Act itself, and the notion that it is impermissible to apply economic pressure for political reasons is now open to question.<sup>173</sup>

Nevertheless, the *Jacksonville* decision is likely to remain controversial. It has already received critical comment<sup>174</sup> and is likely to receive more in the future. Ultimately, however, this criticism will probably be directed less at whether the Court's interpretation of the Act is correct than at whether the result reached by the Court is sound labor policy in general and offers adequate remedies for the employer in particular. Yet, the sweeping policy of the Act itself has never been explicitly repudiated by Congress. In these circumstances the proper balance between the policy of the Act, the possibly conflicting labor policy in other areas, and the possibly inadequate remedies for the employer should be struck by Congress rather than the Court.

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172. See, e.g., *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365 (1960); *United States v. Hutcheson*, 312 U.S. 219 (1941); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

173. See *supra* text accompanying notes 113-18.

174. See, e.g., Rasnic, *Boys Markets and the Labor Injunction Revisited: Jacksonville Bulk Terminals*, 33 LAB. L.J. 704 (1982).

